Session VIII

Addressing All the King's Men

Just as states begin to head down their respective paths in addressing the FCC's August 21, 2003 "Triennial Review Order," the D.C. Circuit Court of Appeals sets up a roadblock with its March 3, 2004 opinion. Amidst the uncertainties, and along with any new developments, this panel discussion charts out both the existing and potential responses of state regulatory practitioners and industry stakeholders.

- **Moderator**:

  Jessica Zufolo – Senior Policy Director, Medley Global Advisors

- **Presenters**:

  Joe Cusick – Director, Idaho Public Utilities Commission
  Tom Koutsky – Vice President, Law and Policy, Z-Tel Communications
  Mark Ortlieb – Senior Counsel, Regulatory, SBC
  Jason Oxman – Counsel, Covad Communications

- **State Representatives:**

  Peter Brown – Attorney, Minnesota Public Utilities Commission
  Phillip Casey – General Counsel, Illinois Commerce Commission
  Paul Duffy – Legal Director, Ohio Public Utilities
  Susan Miller – General Counsel, Maryland Public Service Commission
  Suzanne Patnaude – Chief Counsel, New Jersey Board of Public Utilities

Note:

Additional materials for this session may be provided at the conference.

Existing and Potential Reponses to USTA II

Mark R. Ortlieb
Senior Counsel
SBC 27th Annual National Conference of Regulatory Attorneys
May 19, 2004

Eight Years Without "Lawful Unbundling Rules"

FCC Action		Judicial Reaction
First Report and Order [1]	→	**Iowa Utilities Board II** [2]
UNE Remand Order [3]	→	**USTA I** [4]
Triennial Review Order [5]	→	**USTA II** [6]

1. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15643 (1996) ("First Report and Order")
2. *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 389-90 (1999) ("IUB II")
3. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Forth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3725 (1999) ("UNE Remand Order")
4. *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("USTA I")
5. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("Triennial Review Order")
6. *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C.Cir. 2004) ("USTA II")

Two Potential Avenues For Moving Forward

- Continued Litigation
- Commercial Offerings / Negotiations

What has happened on the Commercial Offering/Negotiation Path?

- FCC Commissioner's Letter - March 31, 2004
- Sage/SBC Agreement - April 3, 2004
- SBC $22 UNE-P Offer - April 20, 2004

SBC / Sage Agreement

- Avoids "extreme uncertainty of the UNE-P approach" and "substantial litigation related costs" (Sage FCC Comments)
- Confidential because it contains provisions that reveal Sage's business strategies and technology requirements.
- Sage may terminate if forced to publicly disclose.
- Should not be subject to "pick and choose".
- Revisions to interconnection agreement contained in §251 Amendment, filed with the state Commissions under §252.

Some States Want to Review the Commercial Agreement

California	Letter request from General Counsel to file Commercial Agreement.
Indiana	Letter request to publicly file Commercial Agreement for 252 Review (5/7/04).
Michigan	Ordered SBC/Sage to file for review (4/28/04). Agreement filed under seal (5/5/04).
Missouri	Issued order to show cause why Commercial Agreement is not subject to 252 review. Response due 5/21/04.
Texas	Ordered SBC/Sage to file Commercial Agreement(5/13/04). Sage filed redacted version on 5/17/04.

SBC Asked FCC For Declaratory Ruling That Filing of Commercial Agreement Not Required

- Requests confirmation that commercially-negotiated arrangements are outside the scope of 251(b) or (c) need not be filed under 252.
- Requests emergency treatment to prevent states from requiring that the Agreement be filed and approved.
- Requests preservation of confidentiality and confirmation that it is not subject to 252(i).

Federal Preemption Law Will Limit a State's Ability to Require Unbundling or Network Elements – An ILEC's View.

Mark R. Ortlieb, Senior Counsel, SBC Illinois

The FCC's national determinations in the *TRO* that ILECs are not required to unbundled the HFPL, splitters, packet switching, hybrid loops, and FTTH loops are straightforward. Yet, in the face of those determinations, CLECs may argue that state commissions retain independent authority to require the unbundling of network elements that the FCC specifically held cannot be unbundled. CLECs may argue, for example, (i) that the law merely requires states to adopt rules consistent with the general provisions of the 1996 Act itself, not with the FCC's orders and rules that implement the 1996 Act; and (ii) that the so-called "savings clauses" of the 1996 Act somehow preserve broad state authority to order unbundling no matter what the FCC's orders and rules might say. But each argument is subject to a strong counterargument under federal preemption law.

(i) The Supreme Court has stated that "[w]ith regard to the matters addressed by the 1996 Act" – such as unbundling requirements—the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. at 366, 378 n.6. (1999) *("IUB II")*. The Seventh Circuit likewise concluded that the federal government passed the 1996 Act in order to "take over some aspects of the telecommunications industry," and that with respect to matters covered by the 1996 Act, the Act and the FCC's implementing regulations "preclude[] all other regulation except on [their] terms." *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 342 (7th Cir. 2000). And in *Wisconsin Bell v. Bie,* 340 F.3d 441, 443 (7th Cir. 2003), Judge Posner of the Seventh Circuit reiterated that any state requirement which "interferes with" or is "inconsistent" with the 1996 Act "is preempted." Thus, in areas addressed by the 1996 Act, state commissions are not free to "do their own thing," but rather "must hew" to the lines drawn by the FCC. *IUB II*, 525 U.S. at 378 n.6.

In passing the 1996 Act, Congress "charged the [FCC] with identifying" which network elements are to be unbundled. *United States Telecom Ass'n v. FCC,* 290 F. 3d 415, 422 (D.C. Cir 2002)*("USTA I")*; 47 U.S.C. § 251(d)(2). In making its decisions as to what "must" and "must not" be unbundled, the FCC was required to adopt a "nuanced" approach that "balance[s]" a number of "competing concerns," *USTA I,* 290 F.3d at 426-27, and by doing so select the best "methods of achieving " Congress' goals. *Wisconsin Bell*, 340 F.3d at 443.

As the Supreme Court has stressed in a long line of preemption decisions, where Congress or congressionally-designated federal agencies have made a specific "policy judgment" as to how "the law's congressionally mandated objectives" would "best be promoted" – as the FCC did in the *TRO* –the states are not at liberty to deviate from those "deliberately imposed" federal prerogatives. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000). Indeed, the Supreme Court repeatedly has observed that state regulation is preempted "to the extent of any conflict with a federal statute". *Crosby v*

National Foreign Trade Council, 530 U.S. 363, 372 (2000) or if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as manifested in the statutory test, structure, and implementing regulations. *Geier,* 529 U.S. at 873; see also *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Federal agency regulations and orders have the same preemptive force as federal statutes. *Fidelity Federal Savings, v. de la Cuesta,* 458 U.S. 141, 153-54 (1982). And as Judge Posner wrote in *Wisconsin Bell*, "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law." 340 F.3d at 443. Simply put, the Supremacy Clause exists to prevent states from overriding carefully calibrated decisions of national law and policy, such as those made by the FCC in the *TRO*. *IUB II*, 525 U.S. at 378 n.6 (states "must hew" to the "lines" the FCC draws).

Consistent with long established law of federal preemption, the *TRO* itself states that where the FCC has held that ILECs are not required to provide certain network elements as UNEs, state commissions must abide by that decision. *TRO* ¶ 192 (under "long-standing federal preemption principles," states are "precluded from enacting or maintaining a regulation or law. . . that thwarts or frustrates the federal regime adopted in [the *TRO*]"). The FCC explained that, except where otherwise specified, its conclusions in the *TRO* are *national* determinations that "states do not have. . . authority . . . to create, modify or eliminate." *Id.* at ¶ 187. The FCC added that if a state commission were to "require the unbundling of a network element for which the [FCC] has . . . found no impairment" – as it did with respect to the HFPL, packet switching, hybrid fiber-copper loops, and FTTH loops – such a requirement "would conflict with the limits set in section 251(d)(2)." *Id.* at ¶195. The FCC was "not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations . . . without regard to the federal scheme." *Id.* at 194. Nor did it agree "with those commenters that maintain that, because [the FCC has] permitted states to add UNEs to [its] national list in the past, [the FCC] cannot limit their ability to continue to do so," because that argument "ignores the fact that prior Commission actions clearly have preemptive effect." *Id.* at ¶ 193. The FCC explained that it "is charged with implementing the Act and [the FCC's] purposes are fully consistent with the Act's purpose," and that FCC rules "clearly ha[ve] preemptive effect" over inconsistent state law. *Id.* at ¶193 & n.614. As such, "states [are] precluded from . . . maintaining a regulation or law pursuant to state law authority that thwarts or frustrates the federal regime adopted in [the *TRO].*" *Id.* at ¶ 192. Instead, the FCC explained, "[i]t will be necessary . . . for the subject states to amend their rules and to alter their decisions to conform to [the FCC's] rules." *Id.* at ¶ 195.

And even if the *TRO* itself were not sufficiently clear, the FCC subsequently explained in its brief to the D.C. Circuit in the *TRO* appeal that in "the UNE context", "a decision by the FCC not to require an ILEC to unbundled a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law." Brief for Respondents FCC and United States in *USTA v. FCC No. 00-1012* (and consolidated cases) at 92-93 (D.C. Circuit filed Dec. 31, 2003) ("FCC *TRO* Appeal

Brief"). Thus, as to UNEs, the FCC has suggested that its rules establish both a federal floor and federal ceiling from which states may not deviate. And the example that the FCC used (FCC *TRO* Appeal Brief at 93 n.41) was packet switching: "this Commission declined to unbundled the packetized functionality of ILEC loops. A state requirement to reverse that decision would substantially prevent implementation of the Act."

(ii) The "savings clauses" of the 1996 Act on which the CLECs rely all require any state-imposed requirement to be fully consistent with the 1996 Act and FCC rules and not undermine national policy decisions. For example, Section 251(d)(3) requires state rules to be "consistent with the requirements" of Section 251 and "not substantially prevent implementation of the requirements of [Section 251] and the purposes of this part [Sections 251-61]." Sections 261(b) and (c) require state rules to be "not inconsistent with" Sections 251-61 and "the [FCC's] regulations to implement" Sections 251-61. In other words, those clauses basically codify the long established principles of conflict preemption. Thus, as the FCC explained, these so-called "savings clauses" are actually "restraints" on state action. *TRO*, ¶ 192. Indeed, the FCC emphasized that the CLECs' over-reliance on the so-called savings clauses "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy." *Id.*

The Sixth, Seventh, and Ninth Circuits also have adopted this limited view of the Act's "savings clauses." See *Verizon North v. Strand,*309 F.3d 935, 940 (6th Cir. 2002) ("Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the FTA"); *Wisconsin Bell v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003) ("The Federal Telecommunications Act is explicit that a state commission's regulations concerning interconnection are not preempted 'if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act].' But if they are inconsistent, they are preempted. A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law") (internal citations omitted)' *Pacific Bell v. Pac-West Telecomm, Inc.,* 325 F.3d 1114, 1128 (9th Cir. 2003) (holding that the clauses cannot be used to support any requirements that "undercut the purposes of § 251" – as the FCC has held a requirement to unbundled the HFPL, packet switching, hybrid loops or FTTH loops would do – and "reject[ing] any suggestion that [the savings clauses] support the CPUC's resort to its general rule-making authority" to impose requirements inconsistent with the 1996 Act).

The recent case of *Verizon North v. Strand,* 2004 WL 893935 (6th Cir.) is to the same effect. There, the Sixth Circuit ruled that a CLEC could not unilaterally establish reciprocal compensation rates via tariff, and that any state statute or Commission order to the contrary was preempted: "[T]he MPSC's Order enforcing Coast's tariff is inconsistent with the Act and is thus preempted despite any state statutes or regulatory findings to the contrary."

Peter Brown

27th Annual National Conference of Regulatory Attorneys

Session VIII - Addressing All the King's Men
Wednesday, May 19, 2004

The Minnesota Report

Outline

I. FCC's press release (February 20, 2003)

II. The Minnesota Commission Opens Two Dockets in Anticipation of its Responsibilities Under the TRO (June 27, 2003)

A. **Docket No. P-999/CI-03-1960**: to determine whether the FCC Triennial Review Order's National Presumptive Finding of No Impairment for Local Switching on High Capacity Loops Available to Business Customers should be rebutted based on a "granular review," i.e. due to specific operational and economic criteria regarding facilities-based entry in Minnesota **(the Docket Evaluating Grounds for a Rebuttal)**

B. **Docket No. P-999/CI-03-1961**: to identify any specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high capacity loops, or dedicated transport **(the Local Impairment Analysis Docket) .**

III. The Docket Evaluating Grounds for a Rebuttal: the 90 day proceeding/granular review (03-1960)

A. First Commission Notice: the MnPUC requests comments on procedural issues related to the FCC's presumptive finding of no impairment for local switching on high capacity loops available to business customers (July 10, 2003)

B. Second Commission Notice: the MnPUC asks parties to declare their intention to participate in the 90-day proceeding, if held, and to provide a summary of the issues they intend to raise (September 16, 2003)

C. Commission Order Opening Investigation and Notice and Order for Hearing (September 30, 2003)

D. Order extending the due date for the Administrative Law Judge's final report from December 15, 2003 to January 15, 2004 (October 27, 2003)

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order	ISSUE DATE: April 21, 2004 DOCKET NO. P-999/CI-03-961 ORDER RESUMING EVIDENTIARY PROCEEDING

PROCEDURAL HISTORY

I. Introduction and Background

A. The Federal Triennial Review Order

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,[1] which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates.[2] On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules was October 2, 2003.

In the Order the FCC refined its definition of the "impair" standard, the touchstone in determining which network elements the incumbent local exchange carriers must unbundle. For some network elements the agency made binding nation-wide findings and set nation-wide rules. For other network elements, the agency adopted rebuttable presumptions for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards.

For still other network elements, the agency articulated the principles to be applied in determining which network elements must be unbundled, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

[2] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq*.

B. Triennial Review Proceedings in Minnesota

On October 3, 2003, the Commission issued its *Order Opening Investigation and Notice and Order for Hearing* in this case, beginning Minnesota's nine-month evidentiary proceeding on the unbundling issues committed to state determination under the Triennial Review Order. The Order referred the case to the Office of Administrative Hearings for contested case proceedings.

In later Orders the Commission endorsed the use of a multi-state forum to develop a single, uniform batch hot-cut process for all states in which Qwest Corporation was the dominant incumbent carrier[3] and narrowed the scope of the proceeding to eliminate issues that had proved to be uncontested.[4]

C. The Stay of the Minnesota Proceeding

On February 25, 2004, the Commission granted an uncontested motion to stay the procedural schedule and discovery process in this case.[5] The moving parties stated that a pending appeal of the Triennial Review Order created a significant risk that the work being done on the case would prove to be unnecessary or irrelevant; they requested a two-month hiatus in the case to avert this potential mis-allocation of resources.

Qwest Corporation – the dominant incumbent carrier whose unbundling obligations are the central issue in this case – agreed to extend its discovery deadlines consistent with the requested stay and agreed not to use any delay resulting from the stay as grounds for claiming that the Commission had failed to exercise its responsibilities under the Triennial Review Order. The Commission granted the stay, finding that "[A]ll parties who appeared at the hearing favored the stay, and it is the parties who are in the best position to weigh the resource-allocation benefits of a stay against the case management issues it may later pose."

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[3] *Order Endorsing Multi-State Forum, Encouraging Participation, and Adopting Schedule and Procedural Requirements*, this docket, November 18, 2003.

[4] *Order Narrowing Scope of Proceeding*, this docket, December 18, 2003.

[5] *Order Staying Procedural Schedule and Discovery Process*, this docket, February 25, 2004.

D. Subsequent Developments and Current Issues

The appeal that prompted the stay in this case has been decided, and it has overturned significant portions of the Triennial Review Order, including the FCC's delegation of fact-finding responsibilities to state commissions.[6] At the same time, however, the appellate court has stayed the effective date of its Order until June 15, 2004, and the FCC has stated its intention to request an extension of the deadline for filing a petition of certiorari with the United States Supreme Court. The Triennial Review Order therefore remains in effect until at least June 15, and possibly longer.

The FCC has also officially urged all members of the telecommunications industry to use the time remaining before the expiration of the stay to reach commercial agreements for the availability of unbundled network elements. The agency states that protracted litigation has unsettled the telecommunications market and that successful negotiation of commercial agreements could restore certainty and preserve competition.

In light of these developments, the Commission issued a notice seeking comments on how best to handle this case when the stay issued by this Commission expires on April 19.

FINDINGS AND CONCLUSIONS

II. Positions of the Parties

The following parties filed comments in response to the Commission's notice:

- Qwest Corporation (Qwest)
- Minnesota Department of Commerce (the Department)
- USLink, Inc. and Integra Telecom of Minnesota, Inc. (USLink/Integra)
- MCImetro Access Transmission Services, LLC (MCI)
- AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (collectively, AT&T)
- Eschelon Telecom of Minnesota, Inc. (Eschelon)
- DIECA Communications, Inc. d/ba/ Covad Communications Company (Covad)

Qwest, the Department, and USLink/Integra recommended extending the stay, with Qwest recommending an indefinite stay, the Department recommending a stay until June 30, and USLink/Integra recommending a stay until such time as the appellate court's decision has been reversed. These parties questioned the value of continuing to invest time and resources in a case that might soon become moot.

MCI, AT&T, Eschelon, and Covad urged the Commission to resume the evidentiary proceeding.

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[6] *United States Telecom Association v. Federal Communications Commission, et al.*, Docket No. 00-1012, D.C. Circuit, March 2, 2004.

These parties stated that, whether the Triennial Review Order is upheld or not, either the FCC or this Commission will need the factual record being developed in this case to move forward.

Finally, Eschelon and USLink/Integra urged the Commission to issue an Order clarifying the terms and conditions under which Qwest must provide unbundled network elements during this period of uncertainty.

III. Commission Action

While the Commission understands the parties' frustration with the uncertainties surrounding this case, the Commission believes that it must position itself to fulfill its obligations under the Triennial Review Order. That Order is currently in effect; it remains in effect through June 15; and it may remain in effect thereafter, depending upon the outcome of future appellate proceedings.

Crediting the Triennial Review Order with the force and effect of law – which it currently, indisputably enjoys – and acting accordingly, is the most logical and defensible course of action at this point. The Commission will therefore permit the stay of this proceeding to expire on April 19 and will require that evidentiary proceedings resume at that time.
Finally, the Commission will not issue an Order clarifying Qwest's unbundling obligations at this juncture, seeing no compelling need to depart from its longstanding practice of disfavoring requests for advisory opinions.[7]

The Commission will so order.

ORDER

1. The contested case proceeding initiated in this case on October 3, 2003 shall resume and continue as contemplated in the February 25, 2004 Order.

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

[7] See, for example, In the Matter of the Petition of Inland Steel Mining Company and Northern Electric Cooperative Association for Approval of the Purchase and Sale of Electricity at Retail, Docket No. E-130/SA-95-1262, *Order Denying Reconsideration* (October 25, 1996).

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order

ISSUE DATE: February 25, 2004

DOCKET NO. P-999/CI-03-961

ORDER STAYING PROCEDURAL SCHEDULE AND DISCOVERY PROCESS

PROCEDURAL HISTORY

I. The Federal Triennial Review Order

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,[1] which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates. [2] On August 21, 2003, the FCC released the text of that

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

[2] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq*.

Order. The effective date of the Order and the new rules is October 2, 2003.

In the Order the FCC refined its definition of the "impair" standard, the touchstone in determining which network elements the incumbent local exchange carriers must unbundle. For some network elements the agency made binding nation-wide findings and set nation-wide rules. For other network elements, the agency adopted rebuttable presumptions for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards.
For still other network elements, the agency articulated the principles to be applied in determining which network elements must be unbundled, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.

II. Triennial Review Proceedings in Minnesota

On October 3, 2003, the Commission issued its *Order Opening Investigation and Notice and Order for Hearing* in this case, beginning Minnesota's nine-month evidentiary proceeding on the unbundling issues committed to state determination under the Triennial Review Order. The Order referred the case to the Office of Administrative Hearings for contested case proceedings.

On February 12, 2004, three parties to the case – US Link, Inc.; McLeodUSA Telecommunications, Inc.; and Integra Telecom of Minnesota, Inc. – filed a motion asking that the procedural schedule and the discovery process be stayed until April 19, 2004.

The moving parties stated that the breadth and complexity of the case made participation burdensome and that a pending appeal of the Triennial Review Order created a significant possibility that the resource-intensive work scheduled for the next two months would prove to be unnecessary or irrelevant. They asked for a two-month hiatus in the case to avert this mis-allocation of resources.

The petition stated that no party to the proceeding opposed a stay. It also stated that Qwest Corporation, Minnesota's dominant incumbent local exchange carrier – and the carrier whose unbundling obligations are the central issue in the case – had agreed to extend its discovery deadlines consistent with the requested stay and had agreed not to use any delay resulting from the stay as grounds for claiming that the Commission had failed to exercise its responsibilities under the Triennial Review Order.

On February 13, 2004, the Administrative Law Judge certified the motion to the Commission. On February 19, 2004, the motion came before the Commission. At that hearing, Qwest confirmed that the petition properly characterized its position and stated that it did not oppose a stay. No party, participant, or member of the public opposed the stay.

FINDINGS AND CONCLUSIONS

The Commission will grant the stay on the terms requested. There is no opposition to the stay. All parties who appeared at the hearing favored the stay, and it is the parties who are in the best position to weigh the resource-allocation benefits of a stay against the case management issues it may later pose.

The Commission will so order.

ORDER

1. The Commission hereby stays the procedural schedule and discovery process in this proceeding until April 19, 2004.

2.. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order

ISSUE DATE: November 18, 2003

DOCKET NO. P-999/CI-03-961

ORDER ENDORSING MULTI-STATE FORUM, ENCOURAGING PARTICIPATION, AND ADOPTING SCHEDULE AND PROCEDURAL REQUIREMENTS

PROCEDURAL HISTORY

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,[1] which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates. [2] On August 21, 2003, the FCC released the text of that

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[2] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq*.

Order. The effective date of the Order and the new rules is October 2, 2003.

In the Order the FCC refined its definition of the "impair" standard, the touchstone in determining which network elements must be unbundled, and explained the significance of other policy factors in reaching unbundling determinations. For some network elements, such as the high-frequency portion of the loop and "greenfield" fiber loops, the agency made binding nation-wide findings and set nation-wide rules on incumbent local exchange carriers' unbundling obligations.

For other network elements, the agency adopted a rebuttable presumption for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards. And for other network elements, the agency articulated the principles to be applied in making unbundling determinations, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.[3]

On October 3, 2003 the Commission issued its Order Opening Investigation and Notice and Order for Hearing in this case, beginning the nine-month proceeding required under the Triennial Review Order. Among other things, that Order required the parties to respond to a list of questions intended to help focus and expedite the investigation. One of those questions was the following:

> ***Low Cost, Batch Hot Cut Process***
>
> *Please comment on a low cost, batch hot-cut process that could be used in Minnesota by Qwest for switching customers from Qwest switches to requesting carrier switches. Also, please comment on whether this process should be developed as a regional OSS process, with certification and implementation by individual states, rather than on a state by state basis.*

On October 31, 2003, three parties to this case – Qwest, MCI, and AT&T – filed a Joint Motion for Adoption of Batch Hot Cut Forum (Joint Motion). The motion, which is attached, argued that it would benefit the competitive market and all competing carriers to have a single, uniform batch hot cut process for all states within the Qwest region. The parties therefore proposed to convene a multi-state forum to attempt to develop a uniform process, with the forum's work product coming to each state commission as it completed its nine-month proceeding under the Triennial Review Order.

On November 12, 2003, Qwest filed its Proposal for Region-Wide Batch Loop Conversion Process.

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[3] The FCC also set a 90-day deadline for state petitions to rebut, as to specific local markets, the agency's presumptive, nation-wide finding that competitive local exchange carriers are not impaired in serving enterprise customers without unbundled access to local circuit switching. This Commission has opened a separate proceeding to investigate the claims of two carriers that there are specific markets in Minnesota where impairment should be found. Docket No. P-999/CI-03-960.

On November 13, 2003, the Joint Motion came before the Commission. No one opposed the motion.

FINDINGS AND CONCLUSIONS

The Commission concurs with the parties that a multi-state forum on the batch hot cut process appears to offer major efficiencies, as well as opportunities to pool the expertise of regulators, public advocates, and industry personnel throughout the Qwest region.

The Commission will grant the Joint Motion. In so doing, the Commission endorses the multi-state forum, strongly encourages interested parties to actively participate, and adopts the schedule and procedural requirements proposed by the moving parties, with one exception. The exception is that parties' comments on or counter-proposals to Qwest's batch hot cut proposal shall be filed within seven days of the date of this Order, not by November 18, as the Joint Motion proposed.

The Commission will so order.

ORDER

1. The Commission grants the Joint Motion for Adoption of Batch Hot Cut Forum, copy attached, with the exception set forth in paragraph 2.

2. The Commission endorses the multi-state forum, strongly encourages interested parties to actively participate, and adopts the schedule and procedural requirements proposed in the motion, with the exception of the deadline for comments on or counter-proposals to Qwest's hot batch cut proposal. Those comments or counter-proposals shall be filed within seven days of the date of this Order.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice) or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order

ISSUE DATE: December 18, 2003

DOCKET NO. P-999/CI-03-961

ORDER NARROWING SCOPE OF PROCEEDING

PROCEDURAL HISTORY

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,[1] which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates. [2] On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules is October 2, 2003.

In the Order the FCC refined its definition of the "impair" standard, the touchstone in determining which network elements must be unbundled, and explained the significance of other policy factors in reaching unbundling determinations. For some network elements, such as the high-frequency portion of the loop and "greenfield" fiber loops, the agency made binding nation-wide findings and set nation-wide rules on incumbent local exchange carriers' unbundling obligations.

For other network elements, the agency adopted a rebuttable presumption for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards. And for other network elements, the agency articulated the principles

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

[2] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq*.

to be applied in making unbundling determinations, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.[3]

On October 3, 2003, the Commission issued its *Order Opening Investigation and Notice and Order for Hearing* in this case, beginning the nine-month proceeding required under the Triennial Review Order. In that Order the Commission required the parties to respond within two months to a list of questions intended to help focus and expedite the investigation. The Commission reserved for itself responsibility for reexamining and potentially redefining the scope of the case in light of the parties' answers to these questions.

On November 18, 2003, the Commission issued an Order approving the parties' proposal to work on developing a low-cost batch hot-cut process, required under the Triennial Review Order to facilitate mass market competition, in a multi-state forum.[4] Any process developed in that context will be submitted for Commission review and approval in this proceeding.

On or before December 4, 2003, the following parties filed responses to the questions listed in the October 3 Order:

- Minnesota Department of Commerce
- AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc., filing jointly as AT&T
- MCImetro Access Transmission Services LLC; MCI WorldCom Communications, Inc.; and Brooks Fiber Communications of Minnesota, Inc., filing jointly as MCI
- Qwest Corporation
- Sprint Minnesota, Inc. and Sprint Communications Company L.P., filing jointly as Sprint
- DIECA Communications, Inc. d/b/a Covad Communications Company

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[3] The FCC also set a 90-day deadline for state petitions to rebut, as to specific local markets, the agency's presumptive, nation-wide finding that competitive local exchange carriers are not impaired in serving enterprise customers without unbundled access to local circuit switching. This Commission has opened a separate proceeding to investigate the claims of two carriers that there are specific markets in Minnesota where impairment should be found. *In the Matter of a Commission Investigation into the FCC Triennial Review Order's National Presumptive Finding of No Impairment for Local Switching on High Capacity Loops Available to Business Customers*, Docket No. P-999/CI-03-960, Order Opening Investigation and Notice and Order for Hearing (September 30, 2003).

[4] Order Endorsing Multi-State Forum, Encouraging Participation, and Adopting Schedule and Procedural Requirements, this docket, November 18, 2003.

- Time Warner Telecom of Minnesota, LLC

All parties agreed that the issues in the case had narrowed significantly since the October 3 Order was issued, mainly because Qwest, Minnesota's dominant incumbent local exchange carrier, had filed notice that in this case it intended to challenge only one of its presumptive unbundling obligations – mass market switching.

On December 11, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. The Parties' Comments

All commenting parties agreed that the only remaining issue in this case is whether there are specific geographic markets in Minnesota where competitive carriers would *not* be impaired in their ability to provide the services they seek to offer by the absence of unbundled access to mass market switching. This issue, of course, turns on myriad intermediate facts and issues.

Several parties commented on these intermediate issues, such as the definition of "market" and the point at which customers should be categorized as "enterprise" (business) customers instead of mass market (residential customers). All parties, however, reserved their right to change their positions in light of future evidentiary developments. Also, the parties who addressed the issue of timing urged the Commission to defer decision-making on intermediate issues until the record had been developed and the case returned from the Administrative Law Judge.

II. Commission Action

The Commission originally referred three broad issues to the Administrative Law Judge:

> The Commission hereby refers for contested case proceedings, as set forth above, the issue of whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport.
>
> Ordering paragraph 1, October 3 Order.

The Commission concurs with the parties that only the first issue – impairment in the absence of mass market switching, including compliance with the requirement to develop a low-cost batch hot-cut process – remains. The Commission will narrow the scope of this proceeding accordingly.

ORDER

1. The Commission hereby redefines the scope of this proceeding by eliminating two of the issues originally referred for contested case proceedings and set forth below:

   (A) whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to high-capacity loops; and

   (B) whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to dedicated transport.

2. Contested case proceedings shall continue on the remaining issues, which relate to impairment in the absence of access to unbundled mass market switching, including issues relating to the low-cost batch hot-cut process.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order	ISSUE DATE: October 3, 2003 DOCKET NO. P-999/CI-03-961 ORDER OPENING INVESTIGATION AND NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,[1] which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates. [2] On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules is October 2, 2003.

In the Order the FCC refined its definition of the "impair" standard, the touchstone in determining which network elements must be unbundled, and explained the significance of other policy factors in reaching unbundling determinations. For some network elements, such as the high-frequency portion of the loop and "greenfield" fiber loops, the agency made binding nation-wide findings and set nation-wide rules on incumbent local exchange carriers' unbundling obligations.

For other network elements, the agency adopted a rebuttable presumption for or against unbundling, and delegated to state commissions the authority to make final determinations,

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

[2] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 CFR 51.307 *et seq*.

applying federal standards. And for other network elements, the agency articulated the principles to be applied in making unbundling determinations, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.[3]

On July 10, 2003, anticipating the release of the FCC Order, this Commission issued a notice seeking procedural comments on the nine-month proceeding it would shortly begin. Among other things, the notice sought comments on the appropriate procedural framework for the proceeding, likely issues, probable parties, and evidentiary requirements.

The following persons filed comments:

- Minnesota Department of Commerce
- Qwest Corporation
- MCImetro Access Transmission Services LLC; MCI WorldCom Communications, Inc.; and Brooks Fiber Communications of Minnesota, Inc., filing jointly as "MCI"
- Citizens Telecommunications Company of Minnesota, Inc. and Frontier Communications of Minnesota, Inc., filing jointly
- Eschelon Telecom of Minnesota, Inc.
- Allegiance Telecom, Inc.
- Sprint Minnesota, Inc.
- AT&T Communications of the Midwest, Inc. and AT&T Local Services on behalf of TCG Minnesota, Inc., filing jointly as AT&T
- McLeod USA Telecommunications, Inc. and the CLEC Coalition[4]

All commenting parties agreed that the issues in this case would be those raised by applying the FCC's impairment criteria to three sets of network elements – mass market local circuit switching, high-capacity loops, and dedicated transport. The FCC reached a general conclusion that competitive local exchange carriers are impaired in their ability to provide service without unbundled access to these elements. The agency also concluded, however, that there were

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[3] The FCC also set a 90-day deadline for state petitions to rebut, as to specific local markets, the agency's presumptive, nation-wide finding that competitive local exchange carriers are not impaired in serving enterprise customers without unbundled access to local circuit switching. This Commission has opened a separate proceeding to investigate the claims of two carriers that there are specific markets in Minnesota where impairment should be found. Docket No. P-999/CI-03-960.

[4] The CLEC Coalition is made up of Otter Tail Telecom, LLC; US Link, Inc. and VAL-ED Joint Venture, LLP d/b/a 702 Communications.

probably market-specific, route-specific, and customer-location-specific cases in which there was no impairment, and it delegated to the states the authority to make those determinations. The following commenting parties stated their intention to participate in the proceeding: Qwest Corporation, MCI, the Department of Commerce, Allegiance Telecom, Inc., AT&T, and Sprint Minnesota, Inc.

On September 25, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Jurisdiction and Referral for Contested Case Proceedings

The Commission has general jurisdiction over Minnesota telephone companies and telecommunications carriers under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, particularly sections 237.02, 237.035, 237.081, and 237.16 The Commission has specific jurisdiction under 47 CFR § 51.319 over the application of the federal impairment standard to mass market switching, high-capacity loops, and dedicated transport, as well as jurisdiction over related issues.

The Commission finds that these issues turn on facts that are best developed through formal evidentiary proceedings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

II. Issues to be Addressed

The ultimate issue in this case is to identify any specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport. That determination turns on myriad intermediate facts.

III. Additional Filings Required

The scope of this proceeding is necessarily broad at this point. Clearly, however, neither the Commission nor the Administrative Law Judge can conduct an impairment analysis of every geographic market, every customer location, and every transmission route in the state. To help focus and expedite this investigation, therefore, the Commission will require the parties to respond to the questions listed below within two months of the date of this Order. Upon reviewing the answers filed by the parties, the Commission may narrow or redefine the scope of this proceeding.

Specific Customer Locations and High Capacity Loops

A. Does any person claim that there is no impairment for high capacity loops at certain specific

customer locations because either (1) the location is currently being served by two or more unaffiliated CLECS with their own loop transmission facilities or (2) two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to CLECS on a wholesale basis at the same capacity level? If you are making this claim, please provide the following information:

1. the identity and location of all customers for whom no impairment is claimed;

2. a description of the evidence you intend to offer establishing the existence of either or both of the conditions required for a finding of no impairment as described above.

B. Does any person claim that, even though the two conditions specified in A above are not met, there are specific customer locations where requesting carriers are not impaired because there are no material economic or operational barriers at a customer location precluding the requesting carrier from economically deploying loop transmission facilities to the customer location? If you are making this claim, please provide the following information:

1. the identity and location of all customers for whom no impairment is claimed;

2. a description of the evidence you intend to offer regarding the application of the following factors:

(a) evidence of alternative loop deployment at that location;
(b) local engineering costs of building and utilizing transmission facilities;
(c) the cost of underground or aerial laying of fiber or copper;
(d) the cost of equipment needed for transmission;
(e) installation and other necessary costs involved in setting up service;
(f) local topography such as hills and river;
(g) availability of reasonable access to rights-of-way;
(h) building access restrictions/costs;
(i) availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.

3. Any other factors or conditions you deem relevant.

Dedicated Transport

A. Does any person claim that there are dedicated transport loops where requesting carriers are not impaired by the absence of unbundled transport because requesting carriers have the ability to self-deploy or have access to third party alternatives? If so, for each route for which you are making this claim, please provide the following information:

1. If you are claiming requesting carriers have the ability to self-deploy, please provide evidence that three or more competing carriers, not affiliated with each other or the incumbent local exchange carrier, each have deployed non-incumbent LEC transport facilities along a specific route;

2. If you are claiming requesting carriers have access to third party alternatives, please provide evidence that competing carriers have available two or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity along a given route between incumbent LEC switches or wire centers.

B. Does any person claim that a requesting carrier is not impaired on a particular route because that route is suitable for multiple, competitive supply even if the conditions specified in A above are not met? If so, for each route for which you are making this claim, please provide the following information:

1. the identity and location of each specific route for which you are making this claim;

2. a description of the evidence you intend to offer regarding the application of the following factors:

(a) local engineering costs of building and utilizing transmission facilities;
(b) the cost of underground or aerial laying of fiber;
(c) the cost of equipment needed for transmission;
(d) installation and other necessary costs involved in setting up service;
(e) local topography such as hills and rivers;
(f) availability of reasonable access to rights of way;
(g) the availability or feasibility of alternative transmission technologies with similar quality and reliability;
(h) customer density or addressable market;
(i) existing facilities based competition;
(j) any other factors you deem relevant for consideration.

Mass Market Switches

A. What should the Commission use as the relevant market when analyzing impairment issues for mass market switching? Should the relevant market be a wire center? A central office? A LATA? An exchange? Something else? Does the commission need to define the relevant market prior to undertaking any of the impairment analysis, or should the parties define the relevant market as part of their advocacy in the substantive impairment proceedings before the administrative law judge? As part of your comments on these issues, please also address the following factors:

1. the locations of customers actually being served (if any) by competitors;

2. the variation in factors affecting competitors' ability to serve each group of customers;

3. a competitor's ability to target and serve specific markets economically and efficiently using currently available technologies;

4. how a competitor's ability to use self-provisioned switches or switches provided by a third party wholesaler to serve various groups of customers varies geographically and;

5. distinguish among markets where different findings of impairment are likely.

B. Does any person claim that the FCC finding of national impairment for mass market switches should be over-turned in any respect? If you are making this claim, please provide the following information:

1. Any market specific evidence establishing the existence of any markets where there are three or more carriers, unaffiliated with either each other or the incumbent LEC, that are serving mass market customers using self-provisioned switches;

2. Any market specific evidence establishing that there are two or more competitive wholesale suppliers of local circuit switching, unaffiliated with each other or the incumbent LEC, in any defined market

C. What is the appropriate cut off for multi-line DS0 customers?

D. Does any person claim that a given, defined market allows self-provisioning of switching even in the absence of three actual independent self-provisioning carriers or two wholesale suppliers of switching? If you are making this claim, please provide the following information:

1. whether competitors are using their own switches to serve enterprise or mass market customers in the market at issue;

2. the role of potential operational barriers, specifically examining whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning, and difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive carriers;
3. the role of potential economic barriers associated with the use of competitive switching;

4. any other factors or issues the person making the claim deems relevant.

E. Does any person claim that impairment to requesting carriers in mass market switching can be eliminated through the use of "rolling" access to unbundled switching for a period of 90 days or more, as described by the FCC in its Triennial Review Order? If so, please provide the following information:

1. describe the type of "rolling" access that you believe will eliminate any impairment;

2. describe the feasibility of the “rolling” access you claim will eliminate any impairment;

3. if some type of access other than “rolling” access will eliminate the impairment, please describe.

Low Cost, Batch Hot Cut Process

Please comment on a low cost, batch hot-cut process that could be used in Minnesota by Qwest for switching customers from Qwest switches to requesting carrier switches. Also, please comment on whether this process should be developed as a regional OSS process, with certification and implementation by individual states, rather than on a state by state basis.

Other Issues

Are there any other issues the Commission needs to consider in the nine-month proceedings? If so, please identify and describe.

IV. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or

may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Much of the discovery conducted in this case will be equally necessary and relevant for all parties. To avoid burdening the parties with preparing and answering duplicative discovery requests, the Department of Commerce has agreed to coordinate the common discovery.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to John Lindell, Public Utilities Financial Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 297-1398; Marc Fournier, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 296-3793; or Steve Alpert, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street,
St. Paul, Minnesota 55101, (651) 296-3258.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

The parties shall work together to facilitate the Administrative Law Judge's issuance of a protective order

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of hearings in this matter will be set by order of the Administrative Law

Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Qwest Corporation, MCI, the Department of Commerce, Allegiance Telecom, Inc., AT&T, and Sprint Minnesota, Inc. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference in this case will be held on Monday, October 13, at 9:00 a.m. in the Large Hearing Room in the offices of the Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Parties and persons intending to intervene in the matter should attend the prehearing conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, protective orders, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

Under 47 CFR § 51.319, the Commission is required to complete its consideration of this case within nine months of the effective date of the Triennial Review Order. The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these time constraints and requests that the Administrative Law Judge submit his final report in time to allow the Commission adequate opportunity for thorough consideration of the case.

V. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers for contested case proceedings, as set forth above, the issue of whether there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport.

2. The parties shall file answers to the questions set forth in section II within two months of the date of this Order.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of a Commission Investigation into
ILEC Unbundling Obligations as a Result of the
FCC Triennial Review Order
MPUC Docket No. P-999/CI-03-961

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:
ADDRESS:
TELEPHONE NUMBER:
PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:
OFFICE ADDRESS:
TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY:_____

DATE: _____

TRIENNIAL REVIEW ORDER ACTIVITIES IN OHIO

1. On August 21, 2002, Federal Communications Commission issues its Triennial Review Order implementing new rules regarding the obligations of ILECs to unbundle certain elements of their networks and to make those elements available to CLECs. FCC delegated to states the responsibility to make certain determinations regarding the unbundling obligations for the ILECs and establish timelines for the states to complete these determinations. The determination of whether an ILEC has to make certain network elements available to competitors depends on whether the competitors are impaired without access to the element. Impairment is determined primarily by whether lack of access to the element poses a barrier to entry that is likely to make entry into a market uneconomic. PUC Ohio opened three cases relevant to the TRO.

Case No. 03-2040-TP-COI, Local Circuit Switching in the Mass Market

3. On a national basis, the FCC determined in its TRO that, with regard to the provisioning of local circuit switching, competitors are impaired without access to local circuit switching when serving mass market (i.e., residential and small business) customers. PUC Ohio issued entry in Case No. 03-2040-TP-COI on October 2, 2003, requiring SBC Ohio, Verizon North, Cincinnati Bell, and Sprint to state whether they wish to challenge, for some or all of their markets, the national finding of impairment relative to mass market local switching. Other Ohio ILECs would remain subject to the FCC's presumption of impairment. SBC Ohio and Cincinnati Bell stated their intent to challenge.

4. The FCC also determined that the operational and economic factors associated with the current hot cut process used to transfer a loop from one carrier's switch to another serves as a barrier to competition in the absence of unbundled switching. State commissions were directed, within nine months of the TRO, either to approve and implement a batch hot cut process that renders the process more efficient and reduces costs or conclude that the current processes do not give rise to impairment in the market and find that the batch hot cut process is unnecessary. By entry issued October 15, 2003, the PUC Ohio directed that a collaborative be formed for the purpose of discussing the need for establishing a batch cut process in SBC Ohio's service territory. The report of the collaborative was ordered to be filed by January 6, 2004, giving a status of the collaborative and identifying those issues that remain in dispute. By entry issued December 19, 2003, the Commission schedules a hearing for March 8, 2004, for those issues related to SBC Ohio's batch cut process that will need to be resolved. By entry issued November 13, 2003, the PUC Ohio determined that the analysis of Cincinnati Bell's batch hot cut process should be consolidated with the analysis of Cincinnati Bell's mass market local switching.

5. On October 28, 2003, PUC Ohio issued entry in Case No. 03-2040-TP-COI that established schedules for the filing of SBC Ohio, Cincinnati Bell, and intervenor testimony relative to the proposed definition of markets to be included in challenge to the FCC finding of impairment of mass market switching, and established hearing date on the issue of defining SBC Ohio's and Cincinnati Bell's markets. Hearings are held December 9-11, 2003.

6. On January 14, 2004, PUC Ohio issues opinion and order in Case No. 03-2040-TP-COI finding that the appropriate geographic markets to be used for purposes of assessing whether a CLEC is impaired in serving mass market customers in the absence of access to unbundled local switching shall be (a) the service areas of SBC Ohio and Cincinnati Bell within each of the metropolitan statistical areas at issue in this proceeding (i.e., Akron, Cincinnati, Cleveland, Columbus, Dayton, and Toledo) divided into separate areas according to Commission-established UNE-loop TELRIC rates (Access Areas B, C, and D for SBC Ohio and Rate Bands 1, 2, and 3 for Cincinnati Bell), and (b) with each resulting area further subdivided into clusters of contiguous wire centers within each applicable UNE-loop TELRIC rate zone. Commission established separate cases to analyze mass market impairment and examine the batch hot cut process for SBC Ohio (Case No. 04-34-TP-COI) and Cincinnati Bell (Case No. 04-35-TP-COI). The Commission also established hearing dates for the SBC Ohio's batch hot cut process and mass market switching reviews (March 8 and March 29, 2004, respectively) and Cincinnati Bell's batch hot cut and mass market switching reviews (March 15, 2004).

7. On February 4, 2004, PUC Ohio clarified that its January 14, 2004, geographic market determination in Case No. 03-2040-TP-COI is tentative. Parties would be required to address the geographic markets tentatively defined by the Commission, but parties may still also present alternate geographic market scenarios for the Commission's consideration at the scheduled hearings. A final determination of geographic markets will not be made until the conclusion of the hearings.

Case No. 03-2041-TP-COI, High Capacity Loops and Dedicated Transport

8. PUC Ohio issues entry on October 2, 2003, requiring that any ILEC seeking to challenge the FCC's national presumption of impairment for dedicated transport (i.e., dark fiber, DS3 transport, and DS1 transport) must file a petition by no later than November 3, 2003, establishing a prima facie case sufficient to overcome the FCC's presumption. SBC Ohio was the only company to file a petition. By entry issued December 3, 2003, the public hearing was scheduled for February 23, 2004. The hearing was held on February 23-25, 2004. No decision has been issued.

Case No. 2042-TP-COI, DS1 Enterprise Customers

9. PUC Ohio issues entry on October 2, 2003. Prior to issuance of order, Commission staff sampled CLECs to determine if any was providing local exchange service to business customers using high capacity loops in combination with unbundled local circuit switching from an ILEC. Staff determined that there were only a few situations where this was occurring. Commission stated in its October 2, 2004, entry in Case No. 02-2042-TP-COI that it would not, on its own accord, initiate a proceeding to challenge the FCC's national presumption of no impairment on this offering. Any CLEC seeking to challenge the national presumption would have to file a petition by October 17, 2003. If no petition were filed, the PUC Ohio said that the case would be closed of record on October 18, 2003. No petition was filed and the case was closed of record.

PUC Ohio Reaction to D.C. Circuit Decision

10. On March 2, 2004, U.S. Court of Appeals, D.C. Circuit, issues its decision in *United States Telecom Association v. Federal Communications Commission and the United States of America* which vacated the FCC's delegation to state commissions of the decision-making authority over impairment determinations related to mass market switching and certain dedicated transport elements. On March 3, 2004, the attorney examiner assigned to Case Nos. 03-2040-TP-COI, 03-2041-TP-COI, 04-34-TP-COI, and 04-35-TP-COI found that, in light of the D.C. Circuit decision, all PUC Ohio cases related to mass market local switching and high capacity loops/dedicated transport shall be held in abeyance until further notice, including hearings and discovery. The attorney examiner noted that it would not be wise to spend the time and resources on these cases in light of the uncertainty surrounding the Triennial Review Order. The PUC Ohio has not issued any entries or orders in the Triennial Review Order-related cases since March 3, 2004.

PUC Ohio case documents can be found at PUC Ohio's Docketing Information System site: http://dis.puc.state.oh.us. Insert case number in "Case # Lookup" box (e.g., 03-2040) and click on "Search." The case docket card will appear. Select desired document in the case by clicking on the date of the document, then click "View Image."

Attorney examiner assigned to the cases:
Jay S. Agranoff
PUC Ohio
614-466-0108
jay.agranoff@puc.state.oh.us

Summary submitted by:
Paul J. Duffy
PUC Ohio
614-466-0122
paul.duffy@puc.state.oh.us

Susan Stevens Miller

POSSIBLE TOPICS

1. Relationship of service provider to retail customers
    a. Outages
        - Repair time
        - Compensation for extended outages
        - Reporting requirements
    b. Overall quality of service
        - Line quality
        - Access to service personnel
        - Trouble Reports
    c. Resolution of Billing Errors/Complaints
        - Slamming and Cramming
        - Truth in Billing
    d. Protect Consumers Private Information
2. Relationship between ILEC and CLEC
    a. Non discriminatory access
    b. Switching/Trunk Capacity
    c. Performance Measurement
    d. Resolution of Intercarrier Complaints

Susan Miller

Summary of Maryland Public Service Commission's (MDPSC)
Triennial Review Activities

On February 20, 2003, the Federal Communications Commission ("FCC") issued a News Release indicating that it had adopted rules concerning incumbent local exchange carrier ("ILEC") obligations to provide unbundled network elements ("UNEs") to competitive local exchange carriers ("CLECs"). At that time, the FCC summarized some of the key issues it had decided and indicated that an order ("*Triennial Review Order" or "TRO")* would be forthcoming.

On March 13, 2003, the National Association of Regulatory Utility Commissioners ("NARUC") appointed a Triennial Review Implementation ("TRIP") Task Force to, among other things, foster the exchange of information among the states, provide technical assistance, and facilitate discussions with interested parties. Don Laub, then director of the MDPSC's Telecommunications Division, was one of the technical staff participants on the Task Force.

While the Task Force was reviewing the *TRO* on a broader scale, the MDPSC was also conducting its own examination of the *TRO*. Under the directions of Commissioners J. Joseph Curran, III and Harold D. Williams, a committee comprised of staff personnel from throughout the Commission pondered the information provided by the FCC in its February 20, 2003, News Release. Based upon the limited summaries contained in the News Release, the MDPSC subcommittee theorized about the potential impact of the *TRO* in Maryland. Additionally, the subcommittee also considered whether the *TRO* would invoke the Maryland Administrative Procedures Act, such that the MDPSC would have to implement its provisions through a rule-making proceeding. The subcommittee was in the process of developing a Notice and Request for Information from Maryland Carriers when the FCC issued the *TRO* on August 21, 2003.

At this time, the MDPSC subcommittee began the long and arduous task of reviewing the *TRO*. Based upon its independent review, and with the assistance of the summaries provided by the TRIP Task Force, the subcommittee made recommendations to the Commission as to how to proceed. The *TRO* became effective on October 2, 2003. Based upon some of the provisions of the *TRO*, state commissions in some circumstances were required to complete some analysis within 90 days of the effective date. On October 3, 2003, the MDPSC issued a Notice Regarding Implementation Issues of the Federal Communications Commission's Triennial Review Order to all local exchange carriers authorized to provide service in Maryland. The Notice established deadlines by which carriers wanting the MDPSC to challenge the FCC's *TRO* impairment findings were to file their petitions. No carrier petitioned the Commission to challenge the FCC's 90-day impairment findings. On October 10, 2003, the FCC hosted a technical workshop on the *TRO* and representatives from the MDPSC attend.

However, on October 31, 2003, Verizon Maryland Inc. filed a petition requesting that the Commission challenge the 9-month impairment findings. Included with its petition was its initial testimony with regard to switching and transport issues and a reservation to file supplemental testimony pertaining to high-capacity issues at a later date. As a result of Verizon's Petition, on October 31, 2003, the Commission formally docketed Case No. 8983, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Order*. On November 5, 2003, the MDPSC held a pre-hearing conference in Case No. 8983.

On November 17, 2003, as a result of the pre-hearing conference, the Commission issued a Notice of Procedural Schedule in which it:

- docketed a second case to consider issues pertaining to the batch hot-cut process (Case No. 8988);
- granted intervention petitions;
- identified a discovery dispute process and designated a Hearing Examiner as the Discovery Judge for such matters;
- made confidential information submitted in this proceeding subject to a protective order (Order No. 78791); and
- established a dual-track procedural schedule for the proceeding with switching and transport issues on one track and the high-capacity loop issue on the other.

On December 4, 2003, the MDPSC issued an Initial Data Request to all Maryland Local Exchange Carriers. Each carrier was requested to populate three spreadsheets with information pertaining to switching, transport, and high-capacity loop questions. Responses were due to the Commission by December 15, 2003. The information once returned to the Commission was made available to party-participants in Case No. 8983 subject to the Protective Order. On January 9, 2004, Verizon filed supplemental testimony to its high-capacity loop case and filed supplemental testimony to its transport case on January 23, 2004. On January 26, 2004, CLECs filed testimony responding to Verizon's switching/transport case. On February 20, 2004, Verizon filed a Petition for Arbitration with the Commission requesting global arbitration of all of it interconnection agreements to conform to the *TRO.*

On March 2, 2004, prior to the next round of testimony and the due date for responses to the Arbitration, the United States Court of Appeals for the District of Columbia Circuit issued an Opinion vacating and/or remanding portions of the *TRO*. However, the Court also stayed issuance of its mandate for a defined period of time. On March 3, 2004, Verizon filed a request that the MDPSC stay Case No. 8983. The MDPSC requested comments from the other parties to the proceedings, and based upon those comments on March 15, 2004, stayed indefinitely both Case No. 8983 and 8988. Since then the MDPSC has been closely observing the *TRO* activity at the federal level.

In a separate decision, on March 15, 2004, the Commission also rejected Verizon's Petition for Arbitration as premature based upon the Court's Opinion. On March 19, 2004, Verizon filed a Petition for Reconsideration of the Commission's rejection of is Arbitration Petition, and thereafter on March 23, 2004, U S LEC filed a separate Petition for Arbitration of an Amendment to its Interconnection Agreement with Verizon. Both matters are currently under consideration by the MDPSC.

Maryland Public Service Commission ("MDPSC") *TRO* Timeline

February 20, 2003	–	FCC issues a News Release indicating that it had adopted rules concerning ILEC obligations to provide UNEs to CLECs.
March 13, 2003	–	NARUC appoints a Triennial Review Implementation (TRIP) Task Force to, among other things, foster the exchange of information among the states, provide technical assistance, and facilitate discussions with interested parties.
June 2003	–	MDPSC establishes subcommittee under the direction of Commissioners J. Joseph Curran, III and Harold D. Williams, to consider the forthcoming *TRO.*
August 21, 2003	–	FCC issued the *TRO*.
October 2, 2003	–	*TRO* becomes effective.
October 3, 2003	–	MDPSC issues a Notice Regarding Implementation Issues of the Federal Communications Commission's Triennial Review Order to all local exchange carriers authorized to provide service in Maryland.
October 10, 2003	–	FCC *TRO Technical Implementation Workshop*.
October 31, 2003	–	Verizon Maryland Inc. filed a petition requesting that the Commission challenge the 9-month impairment findings.
October 31, 2003	–	MDPSC dockets Case No. 8983, *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Order*.
November 5, 2003	–	MDPSC holds a pre-hearing conference in Case No. 8983.
November 17, 2003	–	MDPSC issues a Notice of Procedural Schedule and Protective Order.
November 17, 2003	–	MDPSC docketed Case No. 8988, *In the Matter of the Approval of a Batch Cut Migration Process for Verizon Maryland Inc. pursuant to the Federal Communication Commission's Triennial Review Order*.
December 4, 2003	–	MDPSC issues an Initial Data Request to all Maryland Local Exchange Carriers.
December 15, 2003	–	Responses to MDPSC Data Request due.
January 9, 2004	–	Verizon files supplemental testimony to its high-capacity loop case.
January 23, 2004	–	Verizon files supplemental testimony to its transport case.

January 26, 2004 – CLECs file testimony responding to Verizon's switching/transport case.

February 20, 2004 – Verizon files a Petition for Global Arbitration.

March 2, 2004 – United States Court of Appeals for the District of Columbia Circuit issues an Opinion vacating and/or remanding portions of the *TRO* and stays issuance of its mandate for a defined period of time.

March 3, 2004 – Verizon files a request that the MDPSC stay Case No. 8983.

March 15, 2004 – MDPSC stays indefinitely both Case No. 8983 and 8988. Since then the MDPSC has been closely observing the *TRO* activity at the federal level.

March 15, 2004 – MDPSC rejects Verizon's Petition for Arbitration as premature based upon the Court's Opinion.

March 19, 2004 – Verizon files a Petition for Reconsideration of the Commission's rejection of is Arbitration Petition.

March 23, 2004 – U S LEC files a separate Petition for Arbitration of an Amendment to its Interconnection Agreement wit Verizon.

Suzanne Patnaude
New Jersey

Talking Points "Addressing All the King's Men"
The Triennial Review Order and USTA II

* August 21, 2003 the FCC TRO was issued with an aggressive schedule to conclude all TRO related proceedings within the States by July 2, 2004.
* The two track system established through the TRO incorporating both 90-day and 9 month proceedings was in play. The NJ BPU sought comments from the parties seeking their input on the implementation of the TRO provisions including in part, the waiver process, the impact of the TRO on existing Board rulings and
* Extensive discovery and motion practice ensued between the parties which eventually concluded allowing for hearings to take place.
* A procedural schedule was set up and on virtually the eve of the scheduled hearings the U.S. District Ct. rendered its decision to vacate certain provisions of the TRO.
* Verizon-NJ filed an Emergent Motion to stay the proceedings in NJ which after a telephone conference and the submission of written comments by all effected parties, the Board after deliberation, granted Verizon's Motion to stay the TRO proceedings indefinitely, with the exclusion of the hot cut proceedings.
* The granting of the Motion was conditioned upon Verizon's agreement to forebear seeking relief from the FCC on the basis that the NJ BPU did not timely fulfill its obligations under the TRO and will toll the time period beginning March 5, 2004 to July 2, 2004.
* Prior to the issuance of the Board's Order granting VNJ's Motion, a petition was filed by VNJ seeking arbitration of various amendments to approximately 120 existing interconnection agreements pursuant to the FCC TRO changes.
* Motions to Dismiss the petition were filed by the CLECs based primarily upon the uncertainty of the law, allegations of a failure to negotiate in good faith the terms and conditions of the amendments to the agreements, disputes as to whether or not there was a change in law....and so on.
* The Board is poised to address the Motions before it and has reviewed the determinations of sister state agencies for instructive purposes.
* Considerations for the NJ Board: Is a global arbitration a plausible measure in light of the current climate? Is a practice of group negotiation and or arbitration of interconnection agreements what was envisioned by Congress in drafting the Telco Act? The protracted processes in arriving at language agreeable to the parties in two party arbitration situations lends much skepticism to the success of a process that involves the economies of so many stakeholders.
* Just when the puzzle masters are poised to join the pieces someone challenges their validity.

Note Paper